Filed 5/18/10 In re Cameron L. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re CAMERON L., a Person Coming Under the Juvenile Court Law.	B215416 (Los Angeles County Super. Ct. No. MJ14600)
THE PEOPLE, Plaintiff and Respondent, v. CAMERON L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Morton Rochman, Judge. Affirmed as modified.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Cameron L. appeals from an order of the juvenile delinquency court placing him in the custody, care and control of his probation officer and placing him short term (three months) in a camp-community placement program with a maximum term of confinement of five years and nine months. Appellant asserts the juvenile delinquency court erred in failing to exercise its discretion in deciding whether to: (1) impose the maximum term of confinement; and (2) aggregate the terms on previously sustained petitions. He also claims the court erred in failing to provide him sufficient notice that it intended to aggregate a prior term for which he served probation; and that the court improperly aggregated the term on a dismissed count in a prior petition. As we shall explain, only appellant's claim with respect to the dismissed count has merit. We shall modify the judgment to reflect the correct maximum term of confinement, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Delinquency Petitions and Proceedings. Between July 2006 and February 2008, five delinquency petitions were filed against appellant.

On July 3, 2006, a petition under Welfare and Institutions Code section 602 was filed against appellant alleging that he had made a false report of a criminal offense, a misdemeanor, in violation of Penal Code section 148.5, subdivision (a). (Hereinafter known as the "July 2006 Petition.")

On December 6, 2006, a second section 602 petition was filed against appellant alleging that on October 10, 2006, appellant had resisted, obstructed, or delayed a peace officer or EMT, a misdemeanor, in violation of Penal Code section 148, subdivision (a)(1). (Hereinafter known as the "December 2006 Petition.")

On July 31, 2007, a third section 602 petition was filed against appellant alleging that on June 20, 2007, appellant had committed petty theft, a misdemeanor, in violation of Penal Code section 484 in Count 1; and had given false information to a police officer, a misdemeanor, in violation of Penal Code section 148.9 in Count 2. (Hereinafter known as the "July 2007 Petition.")

On August 16, 2007, the juvenile delinquency court adjudicated the July 2006. December 2006. and the July 2007 petitions. During the proceeding, appellant admitted the allegations in the July 2007 petition. As to the July 2007 petition, the court found the allegation in Count 1 to be true and declared it a misdemeanor. The court dismissed the allegation in Count 2 of the July 2007 petition. The court ordered appellant placed on probation for a period of six months under Welfare and Institutions Code section 725, subdivision (a). The court dismissed the July and December 2006 petitions in the interests of justice.

On December 21, 2007, a fourth section 602 petition was filed against appellant, alleging that, on October 25, 2007, appellant committed a battery on school, park or hospital property in violation of Penal Code section 243.2, subdivision (a). (Hereinafter known as the "December 2007 Petition.")

On February 20, 2008, a fifth section 602 petition was filed against appellant alleging that on February 15, 2008, appellant had made criminal threats, in violation of Penal Code section 422 in Count 1; and street terrorism, in violation of Penal Code section 186.22 in Count 2. As to Count 1, it was further alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members in violation of Penal Code section 186.22, subdivision (b)(1)(A). Both offenses were alleged to be felonies. (Hereinafter known as the "February 2008 Petition.")

On May 8, 2008, the juvenile delinquency court adjudicated the December 2007 and the February 2008 petitions. During the proceeding, appellant admitted the allegations in the February 2008 Petition and pled no contest to the December 2007 Petition. The court sustained the allegation in December 2007 Petition, finding the offense to be a misdemeanor. As to the February 2008 petition, the court found the allegation in Count 1 to be true and declared it a felony. The court dismissed the allegation in Count 2 and the gang enhancement of the February 2008 petition. The court further revoked the previous grant of probation imposed under Welfare and Institutions Code section 725, subdivision (a) based on the sustained Count 1 of the July 2007

petition. The court provided notice that the "maximum aggregated time shall be computed at the time of disposition." The court ordered a supplemental disposition report. The disposition of the matter was continued to August 2008 and thereafter again continued to October 2008.

Current Petition and Proceedings. While the disposition of the December 2007 and February 2008 petitions was pending, on October 22, 2008, a sixth section 602 petition was filed against appellant, alleging that, on October 16, 2008, appellant committed assault with a deadly weapon (namely a jack handle or pipe), a felony in violation of Penal Code section 245, subdivision (a).[1] (Hereinafter known as the "Current Petition.") The petition also included the following statement: "The minor is notified that the People seek to have him confined on all sustained counts of this petition, other petitions currently before this court, and all previously sustained petitions with detention time remaining."[2]

The Current Petition proceeded to trial on February 10, 11 and 20, 2009. At the conclusion of the presentation of evidence and the argument by both sides, the court announced that it was convinced beyond a reasonable doubt that appellant had committed the felony alleged in the Current Petition. The court found the allegation in the Current Petition true and sustained the petition. The court further indicated that the "[d]isposition will not be heard today because I have to review these lengthy files and come up with a proper disposition."

The matter proceeded to disposition on March 2, 2009. At the beginning of the hearing, the court stated that it had reviewed the "extensive files" involving appellant, including the probation report, a letter of recommendation from a teacher and information provided by appellant's counsel for the "ARC Mid-Cities" Program for people with developmental disabilities. The court related that it had reviewed the records relating to

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[1] The underlying facts giving rise to the allegation in the petition are not pertinent to the matters on appeal and are therefore excluded.

[2] Prior petitions contained the same notice.

the prior petitions, and the court briefly recited appellant's prior juvenile record. The court indicated its tentative intention to follow the recommendation of the probation report to involve appellant in the "short-term camp program." The court then gave the parties an opportunity to respond. Appellant's counsel asked that he be released to his mother and emphasized the support appellant had from his family. The court responded that it viewed appellant's mother as responsible for provoking the incident which gave rise to the Current Petition, and that perhaps after appellant had completed the camp program the matter could be reviewed again for his possible placement in the ARC Mid-Cities Program. The court also allowed appellant's parents and the executive director of the ARC Mid-Cities Program to speak concerning the appellant's detention.

The court recited the sentence as: "maximum confinement time by my calculation is five years nine months using the base term of the 245(a)(1) on the October 22 petition and adding one third of the various other sustained petitions."[3] The court indicated that appellant would remain declared a ward of the court and ordered appellant placed short term (three months) in a "Camp-Community Placement Program" and placed in the care, custody and control of the probation officer.

Appellant timely filed a notice of appeal.

DISCUSSION

Before this court, appellant argues that the juvenile delinquency court failed to exercise its discretion in setting the term of his confinement and made other errors in aggregating the confinement terms based on the previously sustained petitions. We address these contentions in turn.

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[3] The March 2, 2009, minute order states: "Maximum aggregated custody time: 5 yrs. 9 mos. The offenses in counts 1 & 2 of the [July 2007] Pet…are misdemeanors; the offense in the [December 2007] Pet…is a misdemeanor and the offense … in [Count] 1 of the [February 2008] pet. is a felony."

A. The Court's Exercise of Discretion.

Appellant contends the order of confinement must be reversed because the trial court did not exercise its discretion in (1) setting his maximum term of confinement; and (2) in deciding to aggregate confinement terms on previously sustained petitions.

1. Maximum Term Determination

When a minor is removed from the custody of his or her parent or guardian as a result of an order of wardship made pursuant to Welfare and Institutions Code section 602, "the juvenile court is required to indicate the maximum period of physical confinement. (Welf. & Inst. Code, § 726, subd. (c).) In setting that confinement period, which may be less than, but not more than, the prison sentence that could be imposed on an adult convicted of the same crime, the court must consider the 'facts and circumstances' of the crime. (§ 731, subd. (c).)" (*In re Julian R.* (2009) 47 Cal.4th 487, 491-492 (*Julian*).) This notwithstanding, California Courts of Appeal in the First and Third Appellate District's have construed section 731 requiring the juvenile court to exercise its discretion in setting the maximum period of confinement only to those minors who were committed to the California Youth Authority (CYA)[4] and not to minors removed from parental custody but not committed to DJF. (See e.g., *In re Eddie L.* (2009) 175 Cal.App.4th 809, 816; *In re Jacob J.* (2005) 130 Cal.App.4th 429, 434-437; *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1183-1187.)

Thus, appellant's claim that the juvenile dependency court erred in failing to exercise its discretion in considering the "facts and circumstances" of his case fails as a matter of law. Here the court was not required to exercise its discretion because the order of confinement did not require appellant's placement in DJF. In any event, a review of the record does not support appellant's claim. While the court did not expressly announce that it based its sentencing determination on the facts and circumstances of the

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[4] The CYA is now the Division of Juvenile Facilities (DJF).

case, the record is not entirely silent on this matter. In fact during the disposition hearing, the court made a number of statements that demonstrated it had considered the entire record and the evidence presented in connection with the Current Petition. The court specifically referred to appellant's prior juvenile record and the evidence presented during the trial. In explaining why the court had declined to release appellant to his mother or family, the court spoke directly to its view of the facts and circumstances of appellant and his case. In our view, the court's comments reflect due consideration of the facts and circumstances in setting the maximum term of confinement.

In reaching this conclusion we reject the suggestion in appellant's reply brief that this court must reverse the order because the court here failed to acknowledge expressly that it had considered the facts and circumstances of the case by completing Judicial Council form JV-732. This new form revised on January 1, 2009, shortly before the adjudication of the Current Petition, requires the court to acknowledge that it has "considered the individual facts and circumstances of the case in determining the maximum period of confinement." (*In re Julian R., supra,* 47 Cal.4th at p. 498.) It does not appear that the court in this case completed the new Judicial Council form. However, based on this record, appellant simply has not demonstrated that he suffered any prejudice as a result of the court's apparent failure to complete the form. Of course, the better practice would have been for the court to complete the JV-732 form. But we are not convinced that the court's order must be reversed and the matter remanded simply to check a box on a judicial council form, where the record shows the court exercised its discretion pursuant to section 731.[5]

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[5] We note that the Supreme Court in *Julian R.* remanded the matter to the trial court and ordered the delinquency court to complete the JV-732 form. But remand was ordered in *Julian R.*, however, to correct other unspecified errors, apparently unrelated to the delinquency court's failure to complete the Judicial Council form JV-732. (*In re Julian R., supra,* 47 Cal.4th at pp. 499-500.)

2. Discretion to Aggregate Prior Terms

When a petition is sustained under Welfare and Institutions Code section 602 the court may consider the juvenile's entire record before exercising its discretion at the dispositional hearing and may rely on prior sustained Welfare and Institutions Code section 602 petitions in determining the proper disposition and maximum period of confinement. (*In re Michael B.* (1980) 28 Cal.3d 548, 553.) Welfare and Institutions Code section 726 permits the juvenile court to aggregate terms on the basis of previously sustained Welfare and Institutions Code section 602 petitions in computing the maximum period of confinement. (*Ibid.*) "Thus, section 726 authorizes the court in a section 602 proceeding to 'aggregate the period of physical confinement on multiple counts, or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602 . . . .'" (*Ibid.*) Aggregation is not mandatory or automatic, but rests within the sound discretion of the juvenile court. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 982.)

In this court, appellant argues that nothing in the record shows that the delinquency court exercised its discretion in deciding whether to aggregate the periods of confinement on previously sustained petitions. Instead, appellant complains the court mechanically added up the terms on the prior sustained petitions and imposed the aggregated sum without any indication that it was aware of its discretion *not* to aggregate.

We do not agree. Appellant has cited to no authority for the proposition that the court must recognize and articulate its awareness of its discretion in deciding whether or not to aggregate terms of prior confinement. In fact, in a related context discussed elsewhere here, the court in *Julian R.* rejected the contention that where the juvenile court does not state on the record that it considered the facts and circumstances that might justify a maximum period of confinement less than the maximum adult term, the reviewing court should presume the juvenile court was unaware of or failed to perform its duty to do so. (See *In re Julian R., supra*, 47 Cal.4th at p. 498.) *Julian R.* held that such a presumption would "require the reviewing court 'to ignore a cardinal principle of appellate review': A '"'judgment or order of the lower court is presumed correct[, and

a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" [Citation.]' As this court has stated, 'we apply the general rule "that a trial court is presumed to have been aware of and followed the applicable law. [Citations.]"' (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) 'This rule derives in part from the presumption of Evidence Code section 664 "that official duty has been regularly performed,"' and thus when 'a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order.' (*Ibid* .)" (*In re Julian R., supra*, 47 Cal.4th at pp. 498-499.)

In our view, *Julian R.*, though it involves the exercise of discretion under Welfare and Institutions Code section 731 rather than Welfare and Institutions Code section 726, subdivision (c), persuades us to reach the same result. Appellant has not presented any convincing argument to distinguish *Julian R.* and overcome the presumption that the juvenile court exercised its discretion in aggregating the terms on prior petitions. In addition, based on our review of the record we are not convinced that the court proceeded to aggregate the prior petitions mechanically. After the court sustained the allegations in the Current Petition on February 20, 2009, the court did not immediately proceed to the disposition. Rather the court continued the matter so it could review and consider the record from the prior delinquency proceedings and petitions. Thereafter, at the outset of the disposition hearing on March 2, 2009, the court stated that it had reviewed the "extensive files" involving appellant and recited on the matters it considered. The court's conduct and comments reflect a consideration of prior delinquency proceedings, which suggests the court's awareness and exercise of discretion in the matter.

In view of foregoing, appellant has failed to demonstrate the court failed to exercise its discretion in setting his maximum term of confinement or in aggregating confinement terms on previously sustained petitions.

B. Alleged Errors Aggregating Prior Terms Based on Previously Sustained Petitions.

Before this court, appellant claims the lower court erred in aggregating the terms of confinement on previously sustained petitions. Specifically he complains the court erred in including Count 1 and Count 2 of the July 2007 Petition in calculating the maximum term of confinement on the Current Petition.

Welfare and Institutions Code section 726, subdivision (c), permits the juvenile court to aggregate terms on the basis previously sustained counts in prior petitions when computing the maximum confinement term. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.) "[W]here the prior offenses are to be considered to aggregate the maximum term to extend it beyond that which could be imposed for the new offense, due process requires notice of the juvenile court's intention in order to provide the minor with a meaningful opportunity to rebut any derogatory material within its prior record. [Citations.]" (*In re Michael B.*, *supra*, 28 Cal.3d at p. 553.) Notice shall be given in terms sufficient to advise the minor of the intent to rely upon previous sustained petitions. "Absent the filing of a petition containing such notice, the court is limited to the maximum period of confinement of the new offense(s) set forth in the section 602 petition." (*Id.* at p. 554.)[6]

When aggregating multiple counts or petitions, the maximum confinement term is calculated by adding the upper term of the principal offense to one-third of the middle

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[6] Any error in failing to provide notice of the intent to aggregate is subject to a harmless error analysis. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 57 (*Steven O.*).) *Steven O.* held that although the petition did not provide the minor with the required notice, there was no prejudice because (1) the minor denied the petition and the matter proceeded to a fully contested jurisdictional hearing, (2) the probation officer prepared a written report prior to the dispositional hearing expressly recommending aggregation, (3) neither the minor nor his counsel registered any objection to or surprise with this recommendation, implying they "knew and understood the court's power and intention to aggregate time," and (4) the only argument they presented regarding disposition was that the minor should be committed to a local camp rather than to the DJJ. (*Ibid.*) *Steven O.* therefore concluded that "[t]he error in failing to include the notice in the supplemental petition was harmless beyond a reasonable doubt. [Citations.]" (*Ibid.*)

term for each of the remaining subordinate felonies or misdemeanors. (*In re Deborah C.* (1981) 30 Cal.3d 125, 140.)

The juvenile delinquency court here determined that appellant's maximum confinement term was five years and nine months, calculated as follows: the principal term of four years for assault count sustained in the Current petition, plus subordinate terms of two months for Count 1 of the July 2007 Petition (petty theft), seven months for Count 2 of the July 2007 Petition (giving false information to the police), eight months for Count 1 of the February 2008 Petition (criminal threats), and four months on the December 2007 Petition (battery).

1. Count 1 in the July 2007 Petition

Appellant contends the juvenile court erred by including the subordinate term on Count 1 of the July 2007 Petitions because the juvenile court had granted him probation on that Count 1 and the court did not give him sufficient notice that his probationary period would be aggregated. He points out that the notice in the Current Petition provided: "The minor is notified that the People seek to have him confined on all sustained counts of this petition, other petitions currently before this court, and all previously sustained petitions with detention time remaining." Appellant argues that the August 16, 2007, probation order on the sustained Count 1 of the July 2007 Petition "did not specify any detention time. Further, there is no finding that [appellant] violated probation, which might make him subject to detention. Therefore, with regard to the six-month probation, there was no 'detention time remaining.'"

Appellant misreads the record. While appellant was on probation he engaged in criminal conduct which resulted in the filing of two additional Welfare and Institutions Code section 602 petitions in December 2007 and in February 2008. Thereafter, in May 2008 during the adjudication of the December 2007 and February 2008 petitions the court revoked the previous grant of probation. The court's revocation of appellant's probation made him subject to detention on Count 1—a circumstance that existed when the Current Petition was filed on October 22, 2008. Thus, the language in the notice "all previously sustained petitions with detention time remaining" reasonably apprised appellant and his

counsel of the People's intent to rely upon Count 1 of the July 2007 Petition in calculating the maximum aggregated custody. Certainly the notice could have been more explicit; it could have specifically listed the previous sustained petitions, prior offenses and corresponding commitment time. But a failure to list all petitions, commitment time and sustained petitions is not reversible error where, as here, notice is sufficient to apprise the minor of those prior petitions and allegations and the minor is given a meaningful opportunity to rebut any derogatory material within his prior record.

In any event, appellant cannot demonstrate that he was prejudiced because he has not shown that he was unaware that the court intended to rely on Count 1 of the July 2007. The probation officer's report and recommendation, which was prepared prior to the dispositional hearing, described in detail the offenses on all previously sustained petitions and the disposition on each petition, and indicated that the maximum custody time for all offenses was 5 years, 9 months. Further, neither appellant nor his counsel objected to or expressed any surprise with the calculation of the maximum confinement term. They argued only that appellant should be placed with his mother or in the ARC Mid-Cities Program. Thus, any error in notice with respect to aggregation of the term of confinement on Count 1 of the July 2007 Petition was harmless beyond a reasonable doubt.

2. Count 2 of the July 2007 Petition.

Appellant claims that the court erred in including Count 2 (giving false information to police officer) of the July 2007 Petition in the maximum term of confinement because Count 2 of the July 2007 Petition had been dismissed on August 16, 2007. The Attorney General concedes that appellant is correct. It does appear that the court included one-third of the middle term (seven months) for Count 2 from the July 2007 Petition even though Count 2 had been dismissed. Because only sustained counts can be aggregated under Welfare and Institutions Code section 726, subdivision (c), this court must modify the maximum aggregated term to exclude the term for Count 2. (See *In re Michael B.*, *supra*, 28 Cal.4th at p. 553 [in a determining the proper disposition and

maximum term of confinement the court relies on prior "sustained" Welfare and Institutions Code section 602 petitions].)

DISPOSITION

The judgment is modified to reflect a maximum confinement term of five years and two months. As modified, the judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.